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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TYVON MARQUIS THOMAS, Defendant and Appellant.	A109473 (Solano County Super. Ct. No. VCR 167613)

Appellant Tyvon Marquis Thomas was convicted, following a jury trial, of possession of cocaine base for sale and possession of a firearm by a felon. On appeal, he contends the trial court erred by denying his motion to suppress evidence based on his allegedly unlawful detention, and further erred by refusing to give two pinpoint instructions regarding "dominion and control" or, alternatively, that the court deprived appellant of a fair trial by refusing to stop prosecutorial misconduct. We shall affirm the judgment.

PROCEDURAL BACKGROUND

Appellant was charged by information with possession of cocaine base for purposes of sale (Health & Saf. Code, § 11351.5–count I), and possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)–count II). The information further alleged, as to count I, that appellant was personally armed with a firearm (Pen. Code, § 12022, subd. (c)), and had a prior conviction (Health & Saf. Code, § 11370.2, subd. (a)).

Appellant moved to suppress evidence, pursuant to Penal Code section 1538.5 and, following a hearing, the trial court denied the motion.

Appellant waived a jury trial on the prior conviction and the parties stipulated that, as to count II, appellant had a prior conviction. Following a jury trial, the jury found appellant guilty as charged, and also found true the firearm allegation in count I. The trial court found true the prior conviction allegation.

Thereafter, the trial court denied appellant's motion for a new trial.

On February 24, 2005, the court sentenced appellant to a total term of 11 years in state prison.

On March 7, 2005, appellant filed a notice of appeal.

FACTUAL BACKGROUND

On May 30, 2003, Vallejo Police Officers Michael Tribble and Mike Wheat were patrolling in northern Vallejo, as part of the Crime Suppression Unit, which attempts to take a proactive approach to drug, gang, and violent crime problems in Vallejo. At approximately 6:00 p.m., the officers observed a group of individuals huddled together, apparently involved in an illegal dice game. As the officers approached, the group broke apart and the people started walking off in different directions.

Two of the people got into a black Chevy Impala and started to drive off. The officers stopped the vehicle due to a Vehicle Code infraction; the license plate was obscured and there was a plastic cover over the plate.[1] Officer Tribble approached the passenger side of the car while Officer Wheat contacted the driver, who was identified in court as appellant. Officer Tribble asked the passenger, Mr. Lewis, whether he was on probation, and Mr. Lewis confirmed that he was, with a search clause as a condition of probation. Officer Tribble asked if he had anything on him he should not have, and Mr. Lewis responded, "No. You can search me." Officer Tribble searched him, but found no contraband.

[1] Specifically, Officer Tribble testified that he could not read the license plate because of the "glare [that] was coming from a plastic cover on top of the license plate." Officer Wheat testified that he could not read the license plate due to the reflection of the sunlight caused by a plastic cover, and that he pulled the car over because the cover over the license plate was illegal.

Officer Wheat then asked appellant to step out of the car so that Officer Tribble could search the passenger area. After appellant—a large man wearing baggy clothes—got out of the car, Officer Wheat asked if he could pat him down to make sure he did not have any weapons, and appellant consented. Officer Wheat felt what seemed to be a large wad of money in appellant's pocket, which appellant said was about $2,500 in cash. He let the officer look at the money; there was $2,700 in total, mostly in twenty-dollar bills. When Officer Wheat asked appellant what he was going to do with the money, he said he was going to purchase a car. He said he used ATMs to get the money. He also said he got the money through his employment, and that there were pay stubs in the car. No pay stubs were found in the car.

Officer Tribble then knelt into the car, where he smelled an odor of marijuana and saw an open bottle of alcohol. He saw burned and unburned marijuana on the center console and noticed that the center console was not fixed to the transmission hump. He opened the console and found about $2,000, mostly in twenty-dollar bills. Appellant said the open bottle was not his. He said he was going to use the $2,000 to meet some girls and go to Reno.

Based on the quantity of money found and the location, Officer Tribble began a thorough search of the vehicle for drugs. He noticed that the passenger side air-bag compartment had some cracks in it and was not flush with the dashboard. He pried the cover off and found three plastic bags; two of them contained a chunk of white rock-type substance and the third contained a pill. He also found a small scale with white residue on the weighing surface, and a fully loaded nine-millimeter handgun.

Officer Tribble searched the rest of the car and found two cell phones in the center console area and a pager on the driver's side visor. He found four documents in the glove box bearing appellant's name, as well as documents with the names Malon Thomas and Marcus Smith. In the trunk, he found another open container of alcohol, an opened box of sandwich bags, an official court document bearing appellant's name, and a significant amount of male clothing in double and triple extra-large sizes. Officer Tribble found no drug paraphernalia in the car.

The officers arrested appellant and Mr. Lewis. Later, at the police station, after appellant had waived his *Miranda* rights, appellant told Officer Tribble the car had been his father's, but appellant had been driving it for the past year or so. It was registered in his sister's name because his father had been unlicensed, and his father had since passed away. Appellant said other people had access to the car while it was parked at his mother's house.

A forensic toxicologist for the Contra Costa County crime laboratory tested the white chunky substance in the two plastic baggies and determined that it was cocaine base. The two chunks weighed 6.78 and 6.70 grams each.

Officer Wheat testified as an expert in the area of possession of cocaine base for sale and personal use, and opined that the seized narcotics were possessed for sale. His opinion was based on the large amount of drugs and the way they were packaged, each with a wholesale value of $200 to $500, which would be sold to users in $20 pieces. He also based his opinion on the amount of money that was found, mainly in twenty-dollar bills; the presence of cell phones and pagers; the baggies; the loaded gun in close proximity to the drugs; the hiding place behind the dashboard; the lack of smoking paraphernalia; and the scale. Finally, in his opinion, drug dealers do not normally leave this quantity of drugs in someone else's possession.

A fingerprint examiner with the Contra Costa County Sheriff's Department criminalistics laboratory examined the three plastic baggies found in the car, but found no usable latent fingerprints. Another fingerprint examiner examined the bullets, scale, and semi-automatic revolver, but was unable to find any usable latent fingerprints on them. The examiner testified that it is unusual to find usable latent prints on evidence.

DISCUSSION

I. *Denial of the Motion to Suppress*

Appellant contends the trial court erred in denying his motion to suppress the evidence seized from the car he was driving, claiming the police officer made an unlawful traffic stop.

A. *Trial Court Background*

On January 21, 2004, appellant filed a motion to suppress the evidence found in the car. On April 9, 2004, the court held a suppression hearing, at which Officer Tribble testified that, as appellant was driving away in his car on May 30, 2003, he and Officer Wheat attempted to read the rear license plate number, to run it on the computer. The plate had a transparent cover over it and Officer Tribble could not clearly read the license plate number. The cover over the plate was a violation of Vehicle Code section 5201, subdivision (f)(2). The officers decided to stop the car due to the Vehicle Code violation.

Officer Wheat testified that, as appellant drove by, he turned around to read the license plate number, but there was a reflection off the plate that made it impossible to read any of the letters or numbers on it. Officer Wheat further testified, "Due to my experience and training with knowing that license plates don't do that, and it's common for some people to put these plastic covers over their license plates to try to prevent people from stealing their . . . registration tabs, it was my experience that's exactly what had been done with this license plate." It was the reflection off the plastic cover that made the license plate unreadable. Later, the officers seized the license plate cover, which was made of clear plastic and fit flush over and around the entire license plate.

The court denied the motion to suppress,[2] explaining: "Okay. Well, you know, the justification for the stop is obviously they're out there to—they are not investigating minor Vehicle Code violations. And I would agree with [defense counsel] that a violation of this Vehicle Code section is de minimus. It's obviously more serious if somebody runs a red light.

"But I don't make the laws. The police don't make the laws. I just try to follow them. And they try to follow them. And I suppose you can call this a pretext stop if you want, but I'm not going to call these officers liars. They both testified. I believe their testimony. I believe them when they said they tried to take the license plate [number],

[2] In his motion to suppress, appellant also challenged the search of the airbag area. He has not, however, raised that issue on appeal.

and they were doing that because they suspected your client was doing more than just driving with an obscured license plate. I'll take them at their word that they saw an obscured license plate."

After reading the relevant statute (Veh. Code, § 5201, subd. (f)(2)), the court continued: "I'm convinced it's a violation. The officers were following—you know, they've got a duty to enforce the law. I'm sure they really didn't care—they were probably pleased that they saw a Vehicle Code section violation. . . . You know, the police probably don't really care much about that, but now they feel they probably have probable cause to stop. Unfortunately for your view, Mr. Cooper, they do. They're supposed to enforce the laws, which includes the Vehicle Code. [¶] So, I think the stop is proper."

B. *Legal Analysis*

"In reviewing the action of the lower courts, we will uphold those factual findings of the trial court that are supported by substantial evidence. The question of whether a search was unreasonable, however, is a question of law." (*People v. Camacho* (2000) 23 Cal.4th 824, 830.)

It is well-settled that "a law enforcement officer may, consistent with the Fourth Amendment, briefly detain a vehicle if the objective facts indicate that the vehicle has violated a traffic law. The officer's subjective motivation in effecting the stop is irrelevant." (*People v. White* (2001) 93 Cal.App.4th 1022, 1025, citing *Whren v. United States* (1996) 517 U.S. 806, 809-810.)

The law at issue here is Vehicle Code section 5201, which provides in relevant part: "License plates shall at all times be securely fastened to the vehicle for which they are issued so as to prevent the plates from swinging, shall be mounted in a position so as to be clearly visible, and shall be maintained in a condition so as to be clearly legible. . . . [¶] . . . [¶]

"(f) No covering may be used on license plates except as follows: [¶] . . . [¶]

"(2) The installation of a license plate security cover is not a violation of this subdivision if the device does not obstruct or impair the recognition of the license plate

information, including, but not limited to, the issuing state, license plate number, and registration tabs, and *the cover is limited to the area directly over the top of the registration tabs. No portion of a license plate security cover shall rest over the license plate number*." (Italics added.)

In the present case, the police officers testified at the hearing on the motion to suppress that there was a clear plastic cover that completely covered the license plate and that the glare reflecting off of the cover made them unable to read the letters or numbers on the plate. The trial court found this testimony credible and concluded that appellant had been properly stopped for a violation of Vehicle Code section 5201, subdivision (f)(2).

We find the trial court's factual findings to be supported by substantial evidence. Contrary to appellant's assertion, the officers testified that the glare was caused by light reflecting off of the plastic cover, not off the license plate itself. We further find that the traffic stop was proper because the license plate cover on the car appellant was driving constituted a violation subdivision (f)(2) of section 5201 of the Vehicle Code in two ways: (1) it "[obstructed and impaired] the recognition of the license plate information," and (2) it violated the requirement that a license plate cover be "limited to the area directly over the top of the registration tabs. No portion of a license plate security cover shall rest over the license plate number." (Veh. Code, § 5201, subd. (f)(2).)

Appellant would have us find ambiguous the words in Vehicle Code section 5201, subdivision (f)(2), that state that no portion of a cover shall "rest over the license plate number," because this language does not make clear what is prohibited. Appellant believes the phrase could mean that the cover must not lean against the plate or rest on the numbers, and, therefore, a license plate cover that covers the entire plate would not be a violation.

Unlike appellant, we do not find the language of the statute in question ambiguous. On the contrary, the words "rest over" plainly describe anything that covers the license plate numbers, and the preceding sentence of the subdivision further makes clear that a cover of any sort over any portion of the plate except "the area directly over

the top of the registration tabs" is prohibited. (Veh. Code, § 5201, subd. (f)(2); see *People v. Coronado* (1995) 12 Cal.4th 145, 151 [if words of a statute are unambiguous, " 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs' "]; *People v. White*, *supra*, 93 Cal.App.4th at pp. 1025-1026 [same].)

Moreover, the fact that the reflection off of the license plate cover in this case rendered the license plate unreadable vividly demonstrates that the statute is reasonable in stating that any cover—even a clear plastic one—over the letters and numbers of the plate is unacceptable. The overarching purpose of Vehicle Code section 5201 is to permit an unobstructed, unimpaired view of a vehicle's license plate at all times. (See *People v. White, supra,* 93 Cal.App.4th at p. 1025.) The statute's prohibition against a cover over the license plate's numbers and letters thus is reasonable and the plastic cover over the license plate in this case constituted a violation of the statute.

Accordingly, the traffic stop did not violate the Fourth Amendment and the trial court properly denied appellant's motion to suppress evidence. (See *People v. White*, *supra,* 93 Cal.App.4th at p. 1025.)

II. *Trial Court's Refusal to Give Requested Pinpoint Instruction and to Stop Prosecutorial Misconduct*

Appellant contends the trial court erred when it refused to give two pinpoint instructions regarding "dominion and control," or, alternatively, that the court deprived appellant of a fair trial by refusing to stop prosecutorial misconduct.

A. *Trial Court's Refusal to Give Pinpoint Instructions*

1. *Trial Court Background*

The court instructed the jury with CALJIC Nos. 12.01 (illegal possession of a controlled substance for sale), 12.00 (lesser offense of illegal possession of a controlled substance), and 12.44 (possession of a firearm by a person convicted of a felony). All three instructions define actual and constructive possession as follows: "There are two kinds of possession: Actual possession and constructive possession. Actual possession requires that a person knowingly exercise direct physical control over a thing.

Constructive possession does not require actual possession, but does require that a person knowingly exercise control over or right to control a thing, either directly or through another person or persons. [¶] One person may have possession alone, or two or more persons together may share actual or constructive possession."

CALJIC No. 12.01 further told the jury: "In order to prove this crime, each of the following elements must be proved: [¶] One, a person exercised control over or the right to control or purchase from another an amount of cocaine base, a controlled substance. Two, the person knew of its presence. Three, the person knew of its nature as a controlled substance. Four, the substance was in an amount sufficient to be used for sale or consumption as a controlled substance. And, five, that person possessed or purchased the controlled substance with the specific intent to sell it." CALJIC No. 12.00 contained similar language, with the fourth element tailored to describe possession only, and the fifth element deleted.

As to count I (possession of cocaine base for sale), the court also instructed with CALJIC No. 3.31, which told the jury that "there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime to which it relates is not committed or is not true. The specific intent required is in the definition of the crime that I gave you a few minutes ago [i.e., possession of the controlled substance with specific intent to sell it]."

Before the court instructed the jury with these and other instructions, defense counsel requested that the court give a special instruction further defining "dominion and control" because he did not feel confident the standard jury instructions adequately defined those terms. The proposed instruction read, "Mere presence or mere knowledge of the presence of contraband is insufficient to support a finding of possession." Counsel also asked for a special instruction that "elaborates on what constructive possession means," as follows: "When the car is shared by more than one person, mere proximity to the contraband, presence in the car where it is found, and association with the person or

persons having control of it are all insufficient to establish constructive possession."[3] The trial court denied both special instruction requests, finding that the standard instructions were sufficient and the proposed instructions were argumentative.

At a hearing on appellant's motion for a new trial, the trial court again stated that the requested pinpoint instructions were argumentative, but also found they were duplicative of the relevant CALJIC instructions, which clearly explain actual and constructive possession.

2. *Legal Analysis*

Appellant argues that the standard instructions "fail to explain what 'dominion and control' or 'exercise of control' means in any tangible way [and] that mere presence [or knowledge] is not the same as exercising dominion and control."

"Upon request, a trial court must give jury instructions 'that "pinpoint[] the theory of the defense," ' but it can refuse instructions that highlight ' "specific evidence as such." ' [Citations.] Because the latter type of instruction 'invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence,' it is considered 'argumentative' and therefore should not be given. [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 886.) "[T]he effect of certain facts on identified theories 'is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.' [Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 570.) Moreover, the trial court need not give a requested instruction that is duplicative of a standard instruction that is given to the jury, even where the requested instruction expressly states a point only implied in the instructions. (*People v. Wright* (1988) 45 Cal.3d 1126, 1143.)

Here, in its instructions to the jury, the trial court repeatedly stated that constructive possession required, first, "that a person knowingly exercise control over or right to control a thing," and, second, with respect to possession of drugs for sale, that the

[3] Appellant acknowledges that this instruction "was more appropriate for a passenger charged with possession, [but argues that] it could be easily modified for this case and appellant's circumstances."

person have the specific intent to sell the drugs. (See CALJIC Nos. 12.00, 12.01, 12.44.) Plainly, these instructions informed the jury that appellant's mere presence and his mere knowledge of the contraband's presence were not sufficient to find him guilty of the crimes charged.[4] Thus, while the requested instructions did elaborate on the requirements stated in the standard instructions, they nonetheless were duplicative of those instructions. (See *People v. Wright*, *supra*, 45 Cal.3d at p. 1143.)

Accordingly, the court did not err in refusing to give the proposed instructions.

B. *Trial Court's Refusal to Stop Prosecutorial Misconduct*

Appellant contends the trial court further erred by failing to stop the prosecutor from committing misconduct during closing argument by misstating the law on the very issue regarding which defense counsel had requested special instructions.

1. *Trial Court Background*

During his rebuttal, the prosecutor observed that defense counsel had told the jury that "mere presence or mere knowledge of the drugs is not sufficient" and stated, "There's nothing in the instructions that says that." Defense counsel objected, stating, "That misstates the law." The trial court immediately overruled the objection and told the prosecutor to resume his argument. The prosecutor continued, "You will not see it in those instructions. [¶] He talked about dominion and control. That is not in the instructions." At that point, defense counsel asked the court if counsel could approach the bench, to which the trial court responded, "No," and the prosecutor continued, "I want you to read the instructions. Read the definition of constructive possession. And you will make your decision based on those instructions and not something that you heard from [defense counsel] in this courtroom." The prosecutor later said, "A lot of the things that [defense counsel] said are incorrect, incorrect statements of the law, incorrect statements of the facts. I'll ask you to keep that in mind as you deliberate."

[4] Contrary to appellant's assertion, the meaning of the word "control" in the instructions is self-explanatory and helps to make clear that mere presence is insufficient.

Defense counsel subsequently requested that the court correct the prosecutor's misstatements of law for the jury and that it give the jury the defense's requested special instructions. When the trial court denied counsel's requests, stating that both counsel had engaged in proper argument, counsel moved for a mistrial, which the court also denied.

At the hearing on appellant's motion for a new trial, the court found that the prosecutor had committed misconduct by arguing about "possession or absence of possession as it relates to the defendant in a way that is contrary to what the applicable law is," but also found that the misconduct was "negligent," not "malicious." The court further found that the misconduct was not prejudicial in light of the court's repeated instructions to the jury that it was not to consider what the lawyers said to be evidence.

2. *Legal Analysis*

Our Supreme Court has explained that " ' " '[a] prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) The defendant need not show that the prosecutor acted in bad faith. (*Id*. at p. 822.)

The California Supreme Court has further observed that " ' " 'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . . .' " [Citation.]' [Citation.] [¶] Prosecutors, however, are held to an elevated standard of conduct . . . ' . . . because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] . . . ' " (*People v. Hill*, *supra*, 17 Cal.4th at pp. 819-820.)

"Although counsel have broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law [citations]. . . ." (*People v. Bell* (1989) 49 Cal.3d 502, 538.) " 'In evaluating a claim of prosecutorial misconduct based

upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner.' [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 132-133; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.)

In the present case, we agree with the trial court that the prosecutor committed misconduct by misstating the law during rebuttal. We also agree, however, that it is highly unlikely that the prosecutor's comments swayed the jury to disregard the court's instructions regarding possession or its repeated reminder that statements made by the attorneys during trial are not evidence.[5] (See CALJIC Nos. 1.00, 1.02.) Moreover, immediately after his misstatement of law, the prosecutor himself admonished the jury "to read the instructions. Read the definition of constructive possession. And you will make your decision based on those instructions and not something that you heard from [defense counsel] in this courtroom." We find no reason to depart from the presumption that the jury followed the court's admonition to follow the law as set forth in the jury instructions, and that it used those instructions alone—and not the prosecutor's improper argument—to reach its verdicts. (See *People v. Welch* (1999) 20 Cal.4th 701, 773.)

Accordingly, we find that the prosecutor's improper remarks were not so egregious as to have prejudiced appellant. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 819.) The comments did not render the trial fundamentally unfair (*ibid*.); nor is there a reasonable likelihood that the jury construed or applied the prosecutor's comments in an objectionable fashion. (See *People v. Valdez*, *supra*, 32 Cal.4th at pp. 132-133; *People v. Berryman*, *supra*, 6 Cal.4th at p. 1072.)

[5] For example, shortly before closing arguments began, the court told the jury: "If anything concerning the law said by the attorneys during their arguments or at any other time during the trial conflicts with my instructions on the law, you have to follow my instructions."

DISPOSITION

The judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Richman, J.